

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JAMES SHADIE ROBERTS,

Defendant-Appellant.

UNPUBLISHED

February 18, 2000

No. 205784

Jackson Circuit Court

LC No. 96-077763-FH

Before: Fitzgerald, P.J., and Saad and Whitbeck, JJ.

PER CURIAM.

A jury convicted defendant James Shadie Roberts of felonious assault, MCL 750.82; MSA 28.277. The trial court sentenced Roberts to serve a term of one to four years' imprisonment. Roberts appeals as of right. We affirm.

I. Basic Facts And Procedural History

A. The Charged Offense

The charged offense in this matter relates to an incident that occurred on Sunday, September 22, 1996. On that day, Peter Kalawert, a licensed private investigator, traveled to Roberts' home in rural Jackson County to serve a civil discovery subpoena on Roberts. At trial, Kalawert testified that he drove onto Roberts' property, which was several hundred yards off the main road, and that he noticed a "No Trespassing" sign posted on the property. Kalawert testified that he parked on the side of the residence and approached the house armed with a handgun, which he had tucked into his belt toward his back left side and then covered with his shirt. He knocked on a corner door and, after receiving no response, went to a door located on the other side of the house. At that time, according to Kalawert, Holly Wireman, Roberts' fiancée, answered the corner door. Kalawert explained that he had legal papers to serve on Roberts. He did not, however, specifically identify himself as a process server.

Kalawert said that moments later Roberts appeared in the doorway and then walked onto the porch where he asked Kalawert "what the f--k [he] wanted." Kalawert recognized Roberts because he had served him with papers, without incident, on at least two previous occasions that same year.

Kalawert testified that he told Roberts that he had “some papers” for him again, at which point Roberts pulled a large automatic handgun from behind his leg and gestured at Kalawert while shouting that Kalawert could not serve him on a Sunday. Kalawert, who said he was not familiar with any law prohibiting service of process on a Sunday, dropped the subpoena in the doorway and backed away from the door toward his vehicle. As Kalawert got into his car, he saw Roberts bend over to pick up the subpoena while pointing the gun in Kalawert’s direction. Kalawert then drove to the local police station and reported what had just occurred.

Roberts and Wireman’s version of these events, relayed at trial, differed considerably from Kalawert’s testimony. Roberts stated that Wireman lived with him only part-time and that the only gun in his house that day was his son’s BB gun. Roberts testified that Wireman told him that “some guy was walking around the house looking in the windows trying to get in the front door.” In an effort to scare off the intruder, he shouted that the state police were coming and that the intruder should leave. In response, Kalawert pulled up his shirt and revealed his gun. Roberts also claimed that Kalawert took the gun from his pants and began waving it under his sweatshirt. Kalawert then unlocked the front door and walked into the living room, where he dropped a set of papers on the floor and stated, “[T]here, now you’re served.”

B. The Police Retrieval Of The BB Gun

Officer Tim Griffin of the Norvell Township Police Department testified that he and two other officers went to Roberts’ home following Kalawert’s complaint. At Roberts’ house, Officer Griffin knocked on the door and identified himself as a police officer while the other officers took cover a short distance away. Roberts answered the door, at which point Griffin grabbed him, pulled him outside, and placed him in handcuffs. Officer Griffin stated that he then asked Roberts where the gun he had used to assault Kalawert was located. Roberts reportedly informed him that the only gun he owned was a BB gun. Officer Griffin said Wireman told the officers that the gun allegedly used to assault Kalawert was inside the home. At Officer Griffin’s request, Wireman entered the house, accompanied by the other officers, and returned a few minutes later with the BB gun. According to Officer Griffin, Wireman gave permission to the officers to accompany her into the house while she retrieved the weapon.

C. Trial Adjournments

Trial in this matter was ultimately set for and occurred on June 30, 1997. On that day, before jury selection began, Roberts informed the trial court that he had, on June 28, retained another attorney following a meeting with his appointed counsel on June 27. Apparently, Roberts was concerned over his appointed counsel’s failure to file pretrial motions concerning suppression of evidence. Because his newly retained counsel could not be present for trial that day, Roberts requested that the trial court adjourn the matter. The trial court, recalling that trial had already been adjourned once because Roberts sought substitution of counsel, denied his request to adjourn.

D. Jury Instructions

Shortly before completion of his case-in-chief, Roberts requested that the court instruct the jury on the elements of criminal trespass and on the prohibition against civil service of process on a Sunday. The requested instructions, as submitted to the trial court, read as follows:

A trespasser is a person who, willfully and without lawful authority, enters upon the property of another, after the owner or occupant, agent or servant of the owner or occupant, forbid the person to enter the property.

Also, a trespasser is a person on the property of another who, without lawful authority, neglects or refuses to depart from the property after the owner or occupant, the agent or servant of the owner or occupant, notified the person to depart from the property.
MCLA 750.552

* * *

The law in Michigan provides that a person may not serve or execute civil process on a Sunday unless a judge orders that the person may serve the civil process on a Sunday.
MCLA 600.1831

You have heard testimony that, on Sunday, September 22, 1996, Peter Kalawert tried to serve a subpoena on James Shadie Roberts. Also, there is evidence that a judge did not order that Peter Kalawert could serve the subpoena on James Shadie Robert [sic] on a Sunday.

You may consider this evidence in your determination whether Peter Kalawert was a trespasser on the property of James Shadie Roberts' property [sic] on Sunday, September 22, 1996, and in your determination of what action James Shadie Roberts could reasonably and lawfully take to evict Peter Kalawert from his property on Sunday, September 22, 1996.

The prosecution objected to these instructions, arguing that neither represented a defense to the charge of felonious assault. Counsel for Roberts argued that the instructions were necessary inasmuch as they were relevant to Kalawert's credibility and what actions Roberts could, reasonably and legally, take to eject Kalawert from his property. The trial court denied Roberts' requested instructions, noting that the remedy for improper service of process is that the service is "no good," and that Roberts' testimony did not support a claim that he was enforcing any right to eject trespassers because he claimed not to have assaulted Kalawert with a weapon, but merely to have ordered him to leave.

II. Trial Adjournments

A. Standard Of Review

Roberts argues that the trial court erred in denying his motion to adjourn so that he could be represented by recently retained counsel. We review a trial court's decision regarding a motion to adjourn a proceeding for an abuse of discretion. *People v Echavarria*, 233 Mich App 356, 368; 592 NW2d 737 (1999).

B. Abuse Of Discretion

To determine whether a trial court abused its discretion in denying a criminal defendant's request for a continuance, this Court must consider whether: (1) the defendant was asserting a constitutional right; (2) the defendant had a legitimate reason for asserting that right; (3) the defendant negligently asserted that right; (4) prior adjournments of trial were at defendant's request; and (5), on appeal, defendant has demonstrated prejudice resulting from the trial court's abuse of discretion. *People v Sinistaj*, 184 Mich App 191, 201; 457 NW2d 36 (1990).

In this case, Roberts was asserting his constitutional right to be represented at trial by an attorney of his own choosing. *Sinistaj, supra*. He claimed he needed new counsel because he was dissatisfied with his appointed counsel's failure to file "the right motions." Assuming this represents a legitimate reason for asserting the right to retain counsel, he negligently asserted the right. As the trial court noted, this matter had been set for trial on that date since May 5, 1997, yet Roberts chose to wait to raise his concerns for more than six weeks, and only did so on the day of trial. While the trial court noted that it had granted an adjournment on at least one previous occasion at Roberts' request, the court had actually adjourned or reset the day of trial on several previous occasions at Roberts' or defense counsel's request. The reasons for some of those adjournments stemmed from conduct attributable to Roberts. Moreover, Roberts has not asserted any prejudice resulting from the trial court's denial of the requested continuance. Considering these factors as a whole, we cannot say that the trial court abused its discretion in denying Roberts yet another adjournment for substitution of counsel.

III. Jury Instructions

A. Preservation Of The Issue And Standard Of Review

Roberts argues that the trial court erred in refusing to charge the jury with the requested instructions on the elements of criminal trespass and civil service of process. This issue is preserved because Roberts requested the instructions at issue. See *People v Cross*, 202 Mich App 138, 148; 508 NW2d 144 (1993). "This Court reviews jury instructions in their entirety to determine whether the trial court committed error requiring reversal." *People v Piper*, 223 Mich App 642, 648; 567 NW2d 483 (1997).

B. Jury Instructions Supported By The Facts

Ordinarily, when a defendant requests instruction on a theory or defense, a trial court is required to give that instruction. *People v Mills*, 450 Mich 61, 81; 537 NW2d 909, mod 450 Mich 1212 (1995). Roberts argues that the supplemental instructions would have aided him in presenting his theory

of the case, i.e., that the Kalawert was a trespasser whom Roberts could lawfully eject. While it is well established that a property owner may use such reasonable force as necessary to eject a trespasser, he or she is not entitled to “assault the invaders with a dangerous weapon.” *People v Doud*, 223 Mich 120, 130; 193 NW 884 (1929). The requested instructions implied that Roberts, in using a weapon to aid his efforts to remove Kalawert from his land, was within his rights as owner of that property. However, a trial court is not obligated to give instructions that do not accurately state the law. *People v Lynn*, 229 Mich App 116, 121; 580 NW2d 472 (1998), rev’d on other grounds 459 Mich 53 (1998). Accordingly, we find no error in the trial court’s refusal to instruct the jury as requested by Roberts.

IV. Ineffective Assistance Of Counsel

A. Preservation Of The Issue And Standard Of Review

Roberts argues that he was denied effective assistance of counsel. Because Roberts did not move for an evidentiary hearing or a new trial on the basis of ineffective assistance of counsel below, this issue has not been preserved for appeal. *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1972). Therefore, this Court’s review is limited to mistakes apparent on the record. *People v Burton*, 219 Mich App 278, 292; 556 NW2d 201 (1996). A claim of ineffective assistance of counsel requires a defendant to establish that (1) the performance of his counsel was below an objective standard of reasonableness under prevailing professional norms, and (2) a reasonable probability exists that, but for counsel’s unprofessional errors, the outcome of the proceedings would have been different. *People v Pickens*, 446 Mich 298, 302-303, 312; 521 NW2d 797 (1994).

B. Failure To Request Adjournment

Roberts first contends that defense counsel was ineffective because he failed to request an adjournment after he learned that a key defense witness would not be able to attend trial. Initially, we note that neither the letter nor affidavits Roberts relies on to support this claim are in the lower court record presented and, thus, are not part of the appellate record. See MCR 7.210(A)(1); *People v Shively*, 230 Mich App 626, 628-629, n 1; 584 NW2d 740 (1998) (affidavit alleging facts in support of ineffective assistance claim attached to defendant’s appellate brief would not be considered by Court of Appeals because it was not part of the lower court record). Nevertheless, even considering the existence of these documents, Roberts’ claim that counsel was ineffective for failing to seek an adjournment so that this witness could testify is without merit because the record indicates that counsel did in fact request an adjournment for that reason, but the trial court denied it.

C. Failure To Investigate

Roberts next argues that his counsel was ineffective for failing to investigate Kalawert’s claims of previous contact with him. Specifically, Roberts argues in a conclusory fashion that, had counsel investigated the validity of Kalawert’s claim, it is likely he would have been acquitted. We note that Roberts has the burden of establishing the factual predicate for this claim. *Ginther*, *supra* at 442-443. Roberts, however, failed to make a record concerning whether his attorney investigated Kalawert’s

claim. Thus, Roberts has failed to sustain his burden of proving ineffective assistance of counsel on this claim.

D. Failure To Request Jury Instructions

Roberts next argues that his trial counsel provided ineffective assistance by failing to request jury instructions on self-defense and the lesser included offense of simple assault. Roberts' testimony at trial was that he did nothing to assault Kalawert, but, out of fear of what this alleged stranger might do, he hid behind the kitchen wall while requesting that the intruder leave his property. To establish a claim of ineffective assistance of counsel, a defendant must overcome a strong presumption that the assistance of his counsel was sound trial strategy. *People v Sanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994). Counsel's decision not to request instruction on a lesser included offense could very well have been a matter of strategy aimed at receiving an acquittal on the basis of Roberts' testimony. This Court has previously recognized that a decision to proceed with an all or nothing defense is a legitimate trial strategy. *People v Rone (On Second Remand)*, 109 Mich App 702, 718; 311 NW2d 835 (1981). That defense counsel's strategy failed does not establish ineffective assistance of counsel. See *People v Stewart (On Remand)*, 219 Mich App 38, 42; 555 NW2d 715 (1996).

For similar reasons, we reject Roberts' argument that counsel's failure to request instruction on self-defense constitutes ineffective assistance. That instruction would have been inconsistent with Roberts' trial testimony. While a defendant may present inconsistent theories of defense, MCR 2.111(A)(2), there is nothing in the record to indicate that the absence of the disputed request for a self-defense instruction was anything more than a matter of trial strategy. That is, trial counsel may have decided not to pursue a self-defense instruction so the jury would believe that Kalawert's testimony was false and that Roberts took no actions consistent with assaulting the process server, even if only to defend himself.

E. Failure To Move For Suppression Of Evidence

Roberts next contends that his counsel was ineffective for failing to move for suppression of evidence gained as a result of what Roberts terms to be the warrantless search and seizure of himself and his home. In doing so, Roberts appears to assert that by accompanying Wireman into the house while she retrieved the weapon alleged by the prosecution to have been used in the assault, the police were executing a warrantless search. From this, Roberts argues that because there was testimony indicating that Wireman lived in the home on only an intermittent basis, she lacked the authority to give consent to the officer's entry of the home, thereby making the "search" unreasonable. Presumably, Roberts is urging this Court to find that such circumstances would require suppression of the weapon as evidence at his trial, and therefore counsel's failure to raise this issue in a pretrial motion constitutes ineffective assistance. We disagree.

Even assuming the officers' actions constituted a search for which either consent or a warrant would be required, there is nothing in the record on appeal that would indicate that Wireman's consent would have been found to be insufficient to support the search in the face of a defense motion to suppress. Although consent to a search must ordinarily be given by the person affected, a third party

may consent to the search when the consenting person has equal right of possession or control of the premises. *People v Goforth*, 222 Mich App 306, 311; 564 NW2d 526 (1997). Further, a third party without actual authority to consent to a search may render a search valid if the police officer's belief in the authority to consent was reasonable. *Illinois v Rodriguez*, 497 US 177, 186; 110 S Ct 2793; 111 L Ed 2d 148 (1990).

Initially, we note that although both Roberts and Wireman testified that Wireman lived in the home only intermittently, there is nothing in the record to indicate that she was not in fact living in Roberts' home at the time she gave the officers consent to enter the dwelling. Moreover, even assuming that Wireman was not in fact living in the house at the time, this Court, in *People v Gary*, 150 Mich App 446, 452; 387 NW2d 877 (1986), declined to impose an obligation on police to inquire regarding a third party's ability to consent to a search unless the circumstances would cause a reasonable person to question the consenting party's power or control over the premises or property. See also *Rodriguez*, *supra*. Here, Wireman was inside the house with Roberts when the officers arrived. After Wireman joined Roberts and the officers outside, she indicated that "they" owned a weapon and gave consent for the officers to accompany her into the house. Although present at that time, Roberts did not object to Wireman granting such consent, nor did he indicate that he disapproved of the officers' actions. On these facts, it was not unreasonable for the officers to believe that Wireman had common authority over the home and could thus offer valid consent. Because it does not appear that a motion to suppress on these grounds would have been granted even had counsel so moved, Roberts has failed to establish ineffective assistance on this claim. Without evidence of prejudice, ineffective assistance cannot be found. *Pickens*, *supra* at 303.

Similarly, we reject Robert's claim that defense counsel was ineffective for failing to raise the issue of his allegedly illegal seizure. Roberts argues, without citation of authority, that in handcuffing him during investigation of Kalawert's complaint of felonious assault, the investigating officers effected a seizure without warrant or probable cause, and that counsel's failure to raise this issue in a pretrial motion was a "serious mistake but for which [he] could have stood a chance of acquittal." With the exception of this conclusory statement, Roberts offers no insight on the purpose such a motion would serve, e.g., to suppress inculpatory statements or evidence seized as a result of the allegedly illegal seizure. Nor does he explain how counsel's failure to raise this issue prejudiced him at trial. Thus, he has failed to meet his burden of establishing ineffective assistance. *Stanaway*, *supra* at 687.

F. Aggressive Defense

Finally, Roberts argues that he was denied effective assistance of counsel as a result of his attorney's overall failure to defend his case aggressively. This argument is founded, in part, on Roberts' allegations in his affidavit attached to his appellate brief, which, as noted above, has not been made part of the record on appeal. See MCR 7.210(A)(1). The remainder of Roberts' argument stems from the combined effect of the alleged errors already discussed. In light of the foregoing discussion on those matters, and considering his failure to make a proper record of the allegations contained in his affidavit, we find Roberts' final allegation of ineffective assistance to be without merit. See *Shively*, n 1 *supra* at 628-629. The burden was on Roberts to establish

evidentiary support for this claim of ineffective assistance of counsel and he has failed to do so. *People v Hoag*, 460 Mich 1, 8; 594 NW2d 57 (1999).

Affirmed.

/s/ E. Thomas Fitzgerald

/s/ Henry William Saad

/s/ William C. Whitbeck